United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

1173

75-7162

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UNITED STATES COURT OF APPEALS
for the Second Circuit

JOHN F. COSTELLOE,

Plaintiff-Appellant,

against

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLANT

John F. Costelloe
Plaintiff-Appellant
216 Little Neck Road
Centerport, New York 11721
516 261-5235

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
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JOHN F. COSTELLOE,

Plaintiff-Appellant 75-7162

v. BRIEF OF PLAINTIFF-APPELLANT

TRANS WORLD AIRLINES, INC.

Defendant-Appellee

STATEMENT OF THE ISSUES

I sued under securities acts and antitrust laws to require that TWA not misrepresent its true financial condition to stockholders, including myself, especially as to tax consequences of airline kickbacks. Dismissal of the action, without required and demanded evidentiary hearing, presents issues including:

THIS COURT SHOULD REMAND THIS CASE FOR CONSIDERATION ON THE MERITS.

a. The doctrine of Emle[a] does not limit jurisdiction of Court or deny standing of party to sue as principal.

b. The case should proceed to the merits without evidentiary hearing already denied.

a. Emle Industries, Inc., v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

c. Evidentiary hearing would in any event occasion proceedings on the merits.

d. Special elements of danger and of misuse of Court processes and confidence require that TWA and Chadbourne not be allowed to have the action dismissed.

CHADBOURNE SHOULD RESIGN FROM THIS CASE.

THIS CASE SHOULD BE UNSEALED.

AGENCIES OF GOVERNMENT MUST IN ANY EVENT BE KEPT APPRISED FREE OF THREAT OF REPRISAL.

FURTHER PROCEEDINGS SHOULD INCLUDE INJUNCTION AGAINST REPETITION OF PAST ABUSES.

STATEMENT OF THE CASE

This case has no conventional record. Dismissal was without demanded evidentiary hearing[a].

I sued TWA to stop TWA from using U. S. mails to misrepresent its true financial condition, with particular reference to kickbacks and their tax consequences. They concerned me as a TWA stockholder, but money was the least of all for me.

TWA acknowledged corporate kickback guilt just a week after I sued[b]. On the working day before that, TWA and

a. Stenographer's Transcript (document #8 in Record), p. 36, line 20: "I request an evidentiary hearing."

b. New York Times, 2/11/75, p. 37
Wall Street Journal, 2/13/75, p. 21

Chadbourne had denounced me for annoying TWA about its kickbacks by letters intended to stop kickbacks. On the day of denunciation, without evidentiary hearing, and on sealed file, in minutes, in camera, the District Court dismissed the action--not on denunciation, but as possibly indecorous though clearly meritorious.

Decorous or not, causually related or not, this action preceded by just one working day the acknowledgment of guilt for TWA; and that, after two years of frustration of Government itself in Departments and Boards and in proceedings of three grand juries in two Federal Districts. The top enforcement official soon lost his head by his hand, leaving notes of ominous imports.

As stated in part by George Spater ("Spater"), partner with me in an earlier form of Chadbourne, Parke, Whiteside & Wolff ("Chadbourne"), while Spater was later in top management of American Airlines, kickbacks had been a major industry problem and a seriously disruptive competitive factor among those who did and those who did not kick back. In the view of some, the kickback was more burden to the industry than is the Shah.

Statements of facts are based on pleadings and published reports believed to be fully accurate. Challenge on such grounds as TWA may mount upon in today's awareness is welcome.

ARGUMENT

Chadbourne and TWA must have known on Friday, February 7, 1975, that on Monday the 10th, TWA would acknowledge corporate kickback guilt. Others, not including Pan American World Airways ("Pan Am"), had done so in December; and earlier accounts had TWA in belief that kickbacks were good for the country and TWA, with lawyers frisking one another for tapes on that kind of behavior.

I did not avail myself of suggested opportunity to seek rehearing. That would not have allowed even my own affidavit. Minutes of testing in normal course would have brought facts to light February 7 which instead came to light February 10, perhaps in consequence of my action decided that earlier day.

We should heed the teaching of Cardozo, J., that life in ever more complex society requires judicial concern beyond privity suitable in simpler and more monarchial life. More than 40 years ago, Congress put truth in securities over privity; and SEC Rule 10B-5 succinctly embodies that teaching.

My demand was not only for truth in TWA financials but also for freedom of access to public markets for private airline services lavishly supported by Government (and so in part by me as taxpayer) in subsidies, direct and indirect, and by tax preferences on enormous scale.

I invoked rights to travel by air safely in honest and efficient private management in uncorrupted public regulation.

I sued only for myself, though truth would be for all. I did not ask for money--not even what TWA owed me--not even fee as a lawyer--though I may.

The "private attorney general" has legitimate role.[a] Congress, inviting private initiative and innovation, deliberately provided such alternative means for guarding public interests which are not always well and quickly served by familiar monoliths, e.g., the Interstate Commerce Commission ("ICC"), Civil Aeronautics Board ("CAB"), Federal Aviation Administration ("FAA"), or even the Securities and Exchange Commission ("SEC"), with limited resources of men and money.

a. Dawson, Public Interest Litigation, 88 Harv. L. Rev. 849 (1975), pp. 888 et seq.

In my concern for announcements over the weekend just preceding the day of suit, February 3, and just following the day of CAB decision on route restrictions by TWA and Pan Am, I had anticipated the Department of Justice's current contest in the Court of Appeals for the District of Columbia the CAB action so induced.[a]

The way TWA was and is, TWA could not rightly respond to my demand for truth in published statements of its financial condition. Its choice was to attack me personally and irrelevantly.[b]

The District Court rejected that attack.[c] It did, however, dismiss the action on grounds that I had worked on examination by the Internal Revenue Service ("IRS") of TWA taxes before February of 1970. That work was on audit of TWA tax returns for years to 1968.

a. Letter from Department of Justice, April 8, 1975:"* * * the Department of Justice filed a Petition with the Court of Appeals for the District of Columbia Circuit seeking judicial review of the Pan American/TWA Route Swap."

b. App. p. 50, para 7

Affidavit in Support of Motion to Seal File (Document #3 in Record), p. 2

Defendant's Memorandum in Opposition to Motion, etc. (Document #7 in Record), pp. 2, 4, 5, 8.

c. Stenographer's Transcript (Document #8 in Record), p. 9, lines 13-25, p. 10, lines 1-12

I would not have worked in 1970 if aware of what was to occur in 1975. The lawyer may be duped by the client, especially a very large one with almost endless choices in relation to a lawyer who is a member of a large firm, and so effectively deprived of substantial choice of his own.[a]

a. Commissioner Sommers, quoted in the Law Journal, 1/30/74, p. 1, col. 1:

> "* * * Attorneys * * * can be the victims of * * * clients * * *.
>
> * * * It is too easy, too tempting to believe that an attorney always has knowledge or awareness sufficient to rouse inquiry into the misshapen schemes of his client.
>
> * * * Much of what I have said was expressed in the Preface of the American Bar Association's Code of Professional Responsibility:
>
> > 'Before the Bar can function at all, as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his clients, to his professional brethen and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era.'"

The years between 1968 and 1975 had made a world of difference.

TWA is public. Its tax life is normative in our value system. Compare the matter of Northrop as reported in the New York Times of May 18, 1975.

TWA lives in and on public bounty. TWA currently seeks domestic subsidy of $180,000,000 to keep it aloft--and management in lucrative and sheltered office and lawyers in good fees--in privacy such as claimed here. TWA has for years had services of air traffic controllers on public payroll numbering almost 100 times the numbers of Federal District Court Judges.

TWA enjoys tax preferences almost beyond dream of avarice. It openly shares them with banking interests, letting them pay tax at effective rate of 13.5%, to the expressed annoyance of legislators.

TWA was off course. The Committee for Re-Election of the President ("CREEP") had come and gone; and TWA management had too long been too intimate with regulators. Arms of Government had been paralyzed. Too many lives of passengers had been lost and too many more were at risk. Fresh air and good feedback were needed.

The Chief of CAB Enforcement, William Gingery ("Gingery"), had been frustrated to the point where death was to come for him by his hand less than two weeks after I sued.

Just a week after I sued, and the working day after decision day below, TWA acknowledged corporate kickback guilt. Management and lawyers sought, in return, personal immunities, but did not prevail.

Acknowledgment of kickback guilt showed a situation which should and would have appeared sooner and would be well and widely known now, had the Court below accorded even minimally required and demanded evidentiary hearing.

TWA misled the District Court, and so misleads the public.

This Court should remand forthwith to District Court for consideration on correct bases.

Airline kickbacks are bane of the industry. They had been under study by three Federal grand juries for about two years, two of the grand juries in Eastern District. It was in Eastern District that TWA acknowledged corporate guilt a week to the day after I sued there.

A spot check at Kennedy Airport in late 1972 had shown TWA twice as bad in ticketing irregularities as the next worst, Olympic, then of the late Onassis; and 17 times worse than Pan Am.

Shortly before, my sometime Chadbourne partner, Spater, then in top management of American Airlines, had pioneered in confessions on CREEP slush funds now so commmon. Spater complained then that American Airlines laundry and slush fund were clean compared to kickbacks rife in the American industry, though not in American Airlines.

Slush funds may be of the past; but kickbacks go on; and the events of this suit suggest participation of lawyers in continuing complicity inappropriate to discharge of duties as lawyer and inimical to the safety of the travelling public and prospects of TWA for survival.

This Court has sure power over its own officers, Chadbourne included. Chadbourne would "scramble" affairs for private purposes to prevent action by Government to protect the public.

Kickback debilitates the airline. It draws off funds needed for safety. It creates tax liability in the amount of kickback times the effective tax rate, which can be in the hundreds of percents in a case of fraud, which should be seen here. Fraud penalty goes to the entire deficiency for the period, not simply to that occasioned by the fraud.

The Internal Revenue Service has long held to the law that kickback by diversion does not reduce taxable income.

In late 1971, Congress amended Section 162(c) of the Internal Revenue Code to rule out deduction for kickback by payoff in cases such as this.

Kickback by diversion is simple, but there may be few suppliers of fungibles such as fuel to pad or skim much without yielding to temptation to blackmail.

Kickback by payout is complicated, and necessitates hard work. Current expenses can bear just so much, as shown by Northrop. That leaves false asset accounting, as in Equity Funding and Homestake.

False asset accounting is never ending. Assets have lives of their own; credits, allowances and all.

Airlines are tempting. Ticketing has little control and tickets are more dear than dollars many times and places. Global operations consuming huge amounts of fuel may occasion some leakage.

I lately became concerned for TWA management in choices between management compensation and safety devices pleasing to pilots; and for undue intimacy between TWA management and top CAB officials, especially its former Chairman, Robert D. Timm ("Timm").

I did what I properly could to alert the IRS and the Department of Justice.

In August of 1974, I met with U. S. Attorney David Trager's ("Trager") assistants and with Gingery, Chief of CAB Enforcement. Gingery was dismayed that 346 had died in March of 1974 when a cargo door flew open although it had been recorded as factory-fixed under Government inspection.

In response to request for recommendation based on my own experience, I suggested that Gingery and his staff lacked needed experience and resources; and that they tie to auditing of the IRS to get benefit of its experience.

December brought proposed legislation of the sort, and airline concessions of kickback guilt, with TWA and Pan Am then abstaining.

January brought woes of Watergate and the flood of slush fund cases. Then came word of the Shah and Government and Air Force of Iran.

And so I sued on February 3, 1975.

TWA and Chadbourne, in retaliation, accused me of annoyance, by letters, the most recent of which was one of January 6, 1975, to TWA Chairman of the Board, Charles C. Tillinghast ("Tillinghast"), as follows:

"Events of January first merit your most careful consideration. There were, inter alia, the Watergate convictions, the Ashland matter with Mills, and the reports of the 3M SEC filing in recognition of the civil and criminal consequences of its slush fund.

* * *

On December first, TWA crashed Mount Weather, cutting the lines to the President's nuclear-attack center and killing 92 for want of a $10,000 warning device. Butterfield had acknowledged the possibility of loss of life but had been reluctant to require the expenditure. This, while, as we now know, the airlines were kicking back hundreds of millions to travel agents and others.

* * *

On December 13, your Fletcher acknowledged TWA responsibility for SCHTAAG. See the copy of my letter to him of December 22, enclosed.

The December 16 issue of Aviation Weekly reported the proposed legislation linking tickets and taxes to curb kickbacks as I had suggested to Justice and CAB in a meeting held the day President Nixon announced his resignation.

* * *

On December 21, press reports of kickback confessions in the grand jury matters seriously implicated TWA.

My former partner, Spater, had complained that kickbacks far overshadowed his own guilt in paying over laundered American Airlines cash to CREEP. The other side of that diversion was false foreign invoicing. It cost Spater conviction and his job. American Airlines paid $175,000 for his legal fees. Under the 3M settlement announced January 1, he would be liable for those fees. Bear that in mind as you enter this new phase of your life.

The dollar amounts in the kickback matter are much larger. They are no less reprehensible or more deductible. And I never heard of death for 92 on Mount Weather as the other side of a political contribution per se.

The 3M SEC filing reported January 1 showed that diversion of even relatively small amounts to a slush fund has enormous consequences for all, requiring SEC disclosure. That is the position I recognized in suing Sperry after Chadbourne had conceded that there was no defense for Dunn's passing as Sperry employee for qualified plan purposes while a full Senior at Chadbourne, with Chadbourne bills written down to create purported salary for Dunn and then grossed up to meet firm needs.

I raised questions of TWA accounting integrity and related questions of safety of human lives in context of the tragic days of 1974 following the March horror of 346 lost at Paris for want of an actual retrofit of a cargo door duly recorded but not made.

* * *

I complained of kickbacks. Kickbacks are now confessed.

I complained of pipeline matters as presenting special safety problems in light of the March disaster near Paris because a door certified as refitted had not been. In April, we now know, the Government had for tax purposes put pipeline assets into contest involving nearly $20,000,000 in all. TWA sued on that in Tax Court in July. Questions ought to be answered sooner than in normal course of tax litigation.

I complained of overpaid management who refused to provide safety equipment needed. We have suffered Mount Weather. Butterfield had anticipated that. He has reversed himself.

I complained of matters of public confidence. Only after Mount Weather did we learn from the House Subcommittee of the suppression of the highly critical FAA report in the Paris disaster. Suppression was to prevent use by survivors in litigation. Suppression became not feasible in the storm after Mount Weather.

I complained of infection by airlines of their regulators, including the FAA. Timm had been taken by Taylor to Lisbon, etc., in April. You were soon off to Bermuda with Timm and McGregor, he of CREEP, in circumstances of such scandal that Timm will not again be Chairman. The FAA, 55,000 of them, are rendered useless or worse. The public were led to rely on what was not there. Brinegar is out. Butterfield is on his way. Staggers, too, has been shown to have been rightly concerned, as conceded now, even by Butterfield.

I complained of interference in tax rulings matters. Mills is now in open disgrace. He does have newly acquired benefit of a relatively short period of limitations, effective midnight, December 31, 1974.

I was deeply concerned in anticipation of the 3M sort.

I had been apprised in April that Chadbourne could not offer justification for Dunn's passing as Sperry employee for retirement plan purposes while a Chadbourne Senior. I sued Sperry and Dunn in hope of clarification.

TWA for you took the occasion to try to implicate me in its terrors. It said, in current stance of participant not party, that what I did was in "personal vendetta." What of the dead and what of the confessions in kickbacks; and what came of CREEP? Do you not regret that warnings were not heeded to enable the pilot and the 91 others to escape Mount Weather? How many more must die?

You said that my actions were "vicious." Compare the perversion of our fiscal system in the hundreds of millions by false ticket currency, often more demanding on resources than valid dollar currency. Who got the diverted funds? Is destruction of the effectiveness of regulatory bodies not vicious?

Are pipeline assets more real than salad oil? See my discussion draft for Trager of 12/25/74, copy enclosed.

Are not the TWA financials hopelessly skewed, even compared to 3M and Sperry? See my notes of 12/23/74, and my affidavit of 1/3/75, copy attached.

You said that I alone was a threat to the combined forces of SCHTAAG. Was it not they who combined against me? What did you have to fear except truth? Is it not sordid to have Chadbourne withhold even pension benefits and collected fees for work I did as a partner to try to implicate me?

If Sperry did right, why didn't it just say so? Did it need you? Did you need it? Could not either one stand on its own deeds? If Sperry did wrong, why did not it long since so acknowledge, as has 3M?

Yet on December 30, with all the new knowledge gained since the mad days of March and the ebullience of Spring and the collapse of CREEP, SCHTAAG, creature of TWA, renews its June challenge.

As my affidavit of January 3, 1975, pages 23-24, paragraphs 100-103, stated:

> '100. If TWA wants to litigate with me, it should sue me or become a party to this suit or at least give up covert stance as dominant participant here in effort by falsehood and deception to prevent me from litigating on anything like conventionally equal terms.
>
> 101. Court's good offices and my time have been wasted by the essentially deceptive and oppressive posture of TWA in the matter. I doubt that others of SCHTAAG than Chadbourne were fully aware of the dominant role of TWA as it first became known December 13.
>
> 102. It is ironic that in proceedings where I would not be granted evidentiary hearing, and indeed have not been, TWA sought to have me barred in all cases without any hearing as to what would be involved. (My suing it in regular course would thus be characterized as insufferable and incurable injury; its proceeding against me in oppressive and covert course is the pattern it has chosen for itself to escape fair trial.)

103. Gulbenkian should be made to speak for itself if only to help judge what to do about Chadbourne for its conduct as purported counsel and to provide, if need be, confirmation of the wisdom of respecting standards governing professional representation and conduct.'

* * *

You cannot cure what you have done but you can stop doing it. I don't ask that you tell Chadbourne to do anything but observe canons of professional ethics. I don't ask you to tell it to pay what it owes me. See letter to Crimmins of 12/29/74, copy enclosed. I do ask that you not pay Chadbourne for the likes of SCHTAAG, or, alternatively, go piggyback on Sperry. Do stop any thought of having Chadbourne implicate me in the TWA terrors or in any rendevous with the SEC.

Your effort at secrecy by surprise has backfired. It is just another instance where your gangs can't shoot straight.

This whole tragic mess is out of my hands except as a private citizen with nothing to hide and no desire but to serve his country and save his family and his deserved reputation.

You have interests of your own. It is unthinkable that as the banks and the Government come into new awareness of you in true light you will linger longer at TWA than Spater did at American. Tend to your interests, and let me tend to mine.[a]

* * *

a. App. pp. 63-71

I wrote to protest to regulators and regulated, only to confirm that they must be mutually infected.

In July of 1974, I came to know that Chadbourne had then put into litigation, for TWA, "pipeline" of wings, engines, landing gear, etc., in a case where the differences in predictable tax results for early years were in the millions of dollars, even without kickback aspects.[a]

a. See p. 23, infra.
App. p. 11
App. p. 39

THE COURT SHOULD REMAND FOR CONSIDERATION OF THE MERITS.

a. The doctrine of Emle does not limit jurisdiction of Court or deny standing of party to sue as principal.

The District Court used the doctrine of Emle as though it were a rule of law to be applied without finding and evaluation of factors necessarily taken into account in application.

Under that doctrine, the Court controls its own procedures through control of advocates in dual roles of officer of the Court and representative of an adverse party.[a] Where found best from the standpoint of administration of justice, including considerations of encouraging confidence in legal representation and in the judicial system, a party may be required to forego his own choice of advocate.

Appearance of evil is a factor. What is evil and how much of one sort equates with another sort are somewhat subjective. I would think that one who challenged kickbacks and got a result in a working day that the whole Government had not got in 2 years did not win the evils sweepstakes.

a. Fisher v. Loew's, 232 F.2d 199, 204 (2d Cir. 1956):

> "the power of the Court to control its officers is continuous and the remedy of disqualification is an instrument to that end."

Nature of the matter is another. Confidence for a daughter in trouble need not equate with an airline busily killing people.

Patent and patent right fare one way; personal matters another; antitrust still another; and taxes quite differently, especially in SEC context, as current cases teach.

Extent of involvement is another. One young lawyer was disqualified after most careful evidentiary hearing and judicial scrutiny into 665 hours of billable time on the former client's very same matter in Richardson[a]. He was disqualified as to one party but not the other, the firm public accountants. Another young lawyer was not disqualified as to anyone for 1,000 hours of work; and this Court is still considering that since October.[b]

If the lawyer is a salesman or a sort of auditor, there may be little secrecy; but if he is in litigation there may be much. Still again, since the privilege is a sort of British import of long ago, there is almost none as to the sovereign.

a. Richardson v. Hamilton International Corporation, 335, F.Supp. 1049; 469 F.2d 1382 (3d Cir., 1972).

b. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation and Chrysler Realty Corporation, 74-1104.

As Judge Moore observed in one of the IBM appeals, Radiant Gas did not shine all the light there is. Having a lawyer in house to trot things by is no way to buy secrecy, under any view, his and mine and Gas included.

There is increasing reluctance to find disqualification where there is imbalance of access to effective legal representation. It is recognized that even deprivation of choice of advocate can be hard--to say nothing of loss of standing.

The Court below dismissed the action and effectively shrank jurisdictions provided without exception or requirement of diversity or jurisdictional amount. The result was not predictable or informed. The seal of secrecy obtained in sudden aggressive misrepresentation by TWA and Chadbourne can hardly add to appearance of goodness.

The laws invoked were enacted long before development of Emle doctrine. Those laws give assured access to District Courts to those who by private initiative and innovation would implement public purposes of laws to require truth in securities and free markets.

The District Court finished dictating its decision within minutes after I first received the affidavits of lawyers of TWA and Chadbourne,[a] abetted by unsworn testimony of the latter in camera. I maintained that the evidence so given was false,[aa] and demanded evidentiary hearing;[b] but was refused.[c]

I was thus deprived of right to proceed as plaintiff pro se in a case of recognized merit which had arisen over the preceding 1975 weekend, on recent current events, for having done some work as a lawyer on TWA taxes not later than February of 1970.

That there had been covert evils Friday the 7th of February came to be known on Monday the 10th. Then TWA acknowledged corporate guilt in kickbacks. Individuals in TWA management, presumably represented by Chadbourne on the 10th, as they had been on the 7th, then sought to get immunity for themselves in return for acknowledgment of corporate guilt.

a. Stenographer's Transcript (Document #8 in Record), pp. 3-4.

App. pp. 44-48.

aa. Stenographer's Transcript (Document #8 in Record), pp. 9, 10, 16, 21.

b. Stenographer's Transcript (Document #8 in Record), pp. 36, 38.

c. Stenographer's Transcript (Document #8 in Record), p. 38.

14. Contingencies, etc.:

(a) Actions are pending in various courts by landowners and others, including owners of property located in areas adjacent to airports used by TWA, seeking to enjoin certain aircraft operations at such airports or to recover damages from the airport operators or the various air carrier defendants, based among other things, upon alleged excessive noise resulting from such operations. TWA is a defendant or a cross-defendant in a number of these actions and is a lessee at the airports involved in a number of other actions. The relative rights and liabilities as among the various persons concerned, including the air carriers, are not entirely clear. Even in those cases in which the air carriers are not defendants any liability of airport operators could result in higher airport costs to air carriers, including TWA, using the airports involved.

(b) TWA has brought suit in the United States Tax Court resisting the assertion against the deficiencies in income taxes for the years 1964 through 1966 of approximately $6,042,000 resulting from the Internal Revenue Service's disallowance and capitalization of certain maintenance, repair and inspection expenses with respect to jet airframes and engines. In the same suit TWA has asserted a claim for refunds in income taxes paid of approximately $6,666,000 that would result from the allowance of additional deductions with respect to the expenses of certain spare parts and the depreciation of certain modification expenses incurred during the years 1963-1969. It is believed that final determination of the asserted deficiencies and TWA's refund claim should not result in any net material liabilities.

(c) A class action has been brought against TWA by approximately 350 former hostesses alleging their discharge by TWA for pregnancy violated Title VII of the Civil Rights Act of 1964. They seek reinstatement, back pay, and attorneys' fees. TWA believes it has substantial defenses to this action. In the event plaintiffs prevail the amount of monetary recovery will depend on various factors affecting each plaintiff's claim and cannot be predicted. It is, however, the opinion of TWA's General Counsel that, in the aggregate, any such recoveries will not materially affect TWA's financial condition.

(d) There exist certain other contingent liabilities resulting from litigations, but in the opinion of TWA's General Counsel none will result in liability which, over and above any insurance coverage in respect thereof, would materially affect TWA's financial condition or interfere with its operation.

and the Government of Ira
the sale of six Boeing 747
purchase price of approxi
are scheduled for delivery
net loss on disposition of
$6,716,000 was recorded in
ownership costs will result

16. Reclassification:

Certain amounts in the
ments have been reclassifie
adopted in 1974.

Auditors' Report

Haskins & Sells
Certified Public Accountan

To the Shareholders of Tra

We have examined the
Trans World Airlines, Inc.
31, 1974 and 1973, and the
of income, retained earnin
tion for the years then ende
accordance with generally
accordingly included such
and such other auditing pr
sary in the circumstances.

In our opinion, the abov
present fairly the consolid
World Airlines, Inc. and su
and 1973, and the consol

Nothing produced by Chadbourne or otherwise indicates any relation at all of any matter worked on (not later than February of 1970, and concerning tax returns of 1968 and earlier years) to the current kickback and antitrust matters. The kickback was unheard of in my time, and the Shah had been no threat.

In July of 1974, TWA had put into litigation in the Tax Court of the United States, so-called pipeline matters--the ones which I had declined to include in the agreed results of TWA audits of years through 1968.[a] They presumably included wings, engines, and landing gear, as to which I had been unable to get adequate accounting data, and, so, had been left out of results of my work on audit of TWA returns through 1968.[b] No doubt the Government will do a far more thorough job in contest of the millions of dollars of taxes there involved than I could have conceived of. There is reason to believe also that any tax liability from kickbacks will be litigated to the extent appropriate.

At the end of January, shortly before filing this action, I had apprised the Internal Revenue Service of growing doubt of TWA tax matters as they were coming to be seen in then current events. This was in fulfillment of professional responsibility.

a. Suit was filed on July 12, 1974. Trans World Airlines, Inc., v. Commissioner of Internal Revenue, 5905-74. For details see excerpt from TWA 1974 Annual Report on facing page.

b. App. pp. 19, 20.

b. The case should proceed to the merits without evidentiary hearing already denied.

Disqualification proceedings work hardship for the challenged person. Even when such proceedings were appropriate in the first instance, as would not have been the case even had I acted as advocate here, they are not to be repeated. Chadbourne and TWA in any event had their one opportunity.

c. Evidentiary hearing would in any event occasion proceedings on the merits.

I have pointed out that Emle does not apply to my situation as principal suing under securities acts and anti-trust laws.

Hearing would confirm that.

Even if the doctrine invoked applied to me as a principal, it would not properly occasion dismissal.

There is clear imbalance of representation here. I am no threat to Chadbourne or TWA. Quite the contrary. There is no risk or chance of violation of confidence. Government surely is effective in administration of the tax laws far beyond any power of mine.

Government recognizes no special privilege or immunity of the lawyer in his representations of financial condition in Securities Acts disclosure matters. This is not a private matter such as the patent rights in Emle or even of the litigation in Silver Chrysler. Tax and SEC compliance have very little of effective lawyer/client confidence in large firm matters; and public interest is heavily weighted in antitrust matters.

d. Special elements of danger and abuse of Court processes and confidence require that TWA and Chadbourne not have this action dismissed.

Emle and its likes are acts of justice to aid operation of the judicial system and support confidence in its workings in special circumstances.

They operate to prevent misuse of the system by an advocate in private pay and aggressive adverse stance as to a former client through no choice or fault of the client.

Consent negates disqualification. So must abuse.

After I was invited into Chadbourne, as its only tax partner and at its initiative, I first learned that a senior partner, Stannard Dunn ("Dunn"), had styled himself also a full time employee of a major client, Sperry Rand Corporation ("Sperry") for the purpose of getting benefits under the otherwise qualified Sperry pension plan. Dunn was not yet retired, and had not received any retirement benefit so sought--at grave risk of disqualification of a plan involving deductions of tens of millions of dollars a year.

I eventually decided that, as the senior Chadbourne tax partner, I could not live with that. I left Chadbourne, agreeing, however, to work as consultant for a period of time. In that capacity, I continued work on the IRS audit of TWA returns for years through 1968, and got success on the matters other than "pipeline", e.g., wings, engines and landing gear. Income adjustments so handled favorably for TWA exceeded $100,000,000.

For TWA, I was also active in getting tax rulings on "leasing" matters. I later learned of what I thought to be grave impropriety by TWA in interference in that matter. I have not yet been able to get satisfication to the contrary.

Nor was I able to get satisfaction as to the matter of Dunn, even after the Internal Revenue Service issued clarifying Revenue Rulings, after I left the firm in protest of what was in prospect. They confirmed plain wrong in Dunn's way.

Inquiries in both matters continued without avail. In April of 1974, Chadbourne at long last admitted that it could not justify what had been done for Dunn.

In keen concern for attempted implication by Chadbourne of me as former tax partner, and as a Sperry stockholder, I brought action under SEC Rule 10B-5, demanding true statement of the Sperry financial condition, and relief from coercive efforts by Sperry and Dunn to cause harm to me in my profession and livelihood for refusing implication as I had.

TWA took a dominant role in that matter as participant, while refusing to acknowledge that or to be treated as a party. TWA was purportedly linked with Sperry and Anaconda and American Brands and Gulbenkian Foundation of Lisbon, to have me put out of all courts for all times in all matters concerning all clients of Chadbourne since I had joined Chadbourne in 1958[a].

I had difficulty as to responsibility. The Southern District sealed that file, the attack continued, and my professional and personal lives were substantially ruined.

a. John F. Costelloe v. Sperry Rand Corporation and Stannard Dunn, 75-7246, "Defendant's Memorandum in Support of Motion to Dismiss Complaint":

> "It is respectfully requested that this Court issue an injunction permanently restraining the plaintiff herein from instigating or threatening to instigate, maintaining, instituting of threatening to institute any action or proceeding against Sperry Rand, or any of the other clients of the firm based upon events which occurred while Costelloe was a member of the firm or employed as a consultant to the firm, or upon matters coming to Costelloe's attention during said period."

This action against TWA was essentially defensive, to disengage as definitively as might be from the disaster course on which TWA was set.

TWA in Eastern District again changed position on my right of access to Courts. In conference with this Court's Conferee on Friday, May 2, 1975, Chadbourne for TWA refused to give assurance (suggested by the Conferee) not to attempt to implicate me in Sperry and TWA tax matters from which I, for so long have been actually disengaged. In Sperry, as here, it is wrongly asserted that I must have foreseen, in 1968, events which did not occur until years later, including Dunn's retirement in 1971 in apparent Sperry employee status in addition to that of Chadbourne senior partner. As recently as Friday, May 16, Dunn in telephone conversation refused to say what his status may have been determined to be.

CHADBOURNE SHOULD RESIGN FROM THIS CASE.

Chadbourne is involved too much in too many ways.

Chadbourne represents TWA, which was conceded to be in corporate criminal guilt in kickbacks the very working day after the decision below.

Chadbourne also represents TWA management. TWA management conceded corporate guilt in effort to escape individual liability for kickbacks. TWA management have serious problems of personal liability for waste of corporate funds in kickbacks. Their situation in this is apparently more grave than situations of those in slush fund cases who have admitted large personal liabilities to the corporations involved.

The divergence of such interests has already impeded the process of decision needlessly and in violation of standards of professional conduct.

Chadbourne also has its own interests in litigation. For years, it sought to tie them to those of persons which it had served and which I had served. Only after years of such insistence did it concede, in April of 1974, that it could provide no justification for the dual roles of its Dunn as senior partner and purported employee of Sperry,

under pension and option plans for employees. It still has no defense, according to conversations of mine with Dunn and Sperry's Secretary Schmitter on Friday, May 16, 1975.

Friday, the 16th, Warner of Chadbourne did offer, for the first time, to consider settlement of the long-standing differences between Chadbourne and myself, without encore of earlier efforts to tie to differences with clients, especially Sperry and TWA. He denied that there has been any effort to have me enjoined from access to all Courts. That effort had been made in the Sperry case last June, and was renewed last December.

In so offering, Warner proposed terms unduly favorable to Chadbourne, while proposing to leave matters such as this in contest. Thus continues the basic offense of representing divergent interests, especially self-interests of the representative.

I have no choice but to continue to act as principal trying to extricate myself. TWA has choice; and Chadbourne should resign.

THE FILE IN THIS CASE SHOULD BE UNSEALED.

Grievance asserted by Chadbourne was rejected in correspondence with the District Court[a]. I declined to file a petition for rehearing since that would have involved contest on facts without so much as an affidavit of my own.

There is nothing of mine which could be thought to warrant seal.

TWA is losing revenue now as no other airline ever has. Its prospects of survival are poor. Seal here, following seal of the litigation wherein claims are made for loss of the lives of the 346 who died outside Orly, and following suppression of the administrative report on the cause of that, may be a factor in erosion of confidence of the public reflected in the decline in traffic involved.

Consideration of the difficulties of the smaller litigant indicated in Silver Chrysler strongly suggests that existing burdens ought not be increased by experience such as mine here.

a. App. p. 119 et seq.

As an individual bound in conscience to respect the laws under which I worked, I made the practical error of exercise of individual conscience.

I hope that my experience is not illustrative of a new process of decision antithetical to long established policy of free access to open justice in public surveillence.

The file should be unsealed, to let the public know what really is involved, and to prevent misuse of judicial facilities as an ostensible repository of a secret which does not and cannot exist.

Kickbacks and TWA guilt in them now are common knowledge. That illegal payments of the sort occasion grave tax and SEC problems has become common knowledge since the first of the year, surely since the time of public awareness of acknowledged TWA guilt just after decision below.

The public knows the problem, and Government knows it too. Any notion that I annoyed TWA about kickbacks is not now enough to sustain seal. Nor is any contention that I ought to be barred from all courts for all times. That still persists for Sperry and Chadbourne in another case on appeal here.

AGENCIES OF GOVERNMENT MUST IN ANY EVENT BE KEPT APPRISED, FREE OF POSSIBLE THREAT OF REPRISAL.

The lawyer who is aware of fraud is bound to apprise affected tribunals, defined to include administrative agencies and branches of the Executive.

In the conference with the Court of Appeals Conferee on Friday the 2nd of May, Chadbourne took the position that seal of file requires only that contents not be disseminated to the public.

My experience, and the continuing course of action in relation to District Court by TWA, especially in respect of kickbacks, and to the SEC and the IRS, as related here, calls for notification of those bodies. The SEC has asked to see my brief to consider filing amicus in this case. Justice has expressed interest, and so have others

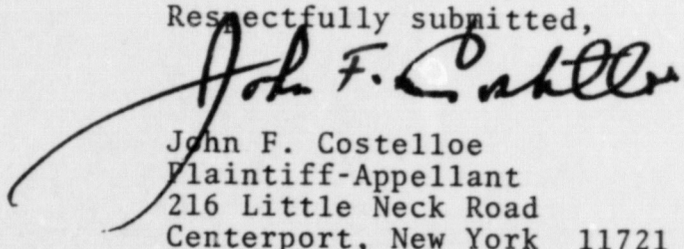
Let the truth be known to the governors, then. And why not to the governed; to the putative victims of the next specific disaster on the general course of TWA?

CONCLUSION

It is respectfully submitted that the orders below should be reversed and this case should be remanded to District Court.

Dated: May 23, 1975

Respectfully submitted,



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